HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 935, 936 /2004 (M/S)

Smt. Sunita GuptaW/o Sh. V.K. Gupta,
Amit Kumar

vs

Bhagat Ram Kapoor
S/o Late Sh. Mohan Lal Kapoor

Approved for reporting

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~~Not Approved for Reporting~~

Date of decision 29.9.2004.

Initial of Judge

HIGH COURT OF UTARANCHAL AT NAINITAL

Writ Petition No. 935 (MS) of 2004

Smt. Sunita Gupta
W/o Sh. V.K. Gupta
R/o Shiv Niwas Vikas
Colony Haridwar. ..... Petitioner

VS

Bhagat Raam Kapoor
S/o Late Sh. Mohan Lal Kapoor
Arya Nagar Jwalapur
Dist- Haridwar and others. ..... Respondents

Writ Petition No. 936 (MS) of 2004

Amit Kumar Chawla
S/o Sh. Roop Chand Chawla
Shopkeeper, Kapoor Niwas,
Kankhal Marg, Arya Nagar
Jwalapur, Dist. Haridwar. ..... Petitioner

VS

Bhagat Ram Kapoor
S/o Late Sh. Mohan Lal Kapoor
R/o Kapoor Niwas, Kankhal Marg,
Arya Nagar, Jwalapur Dist- Haridwar
And others. ..... Respondents.

Counsel for the petitioner Sh.Deshraj Singh
Standing Counsel for the respondents.

Dated:29-9-2004

Hon'ble Rajesh Tandon J.

Heard Sh. Deshraj Singh learned counsel for the petitioner and Standing Counsel for the respondents.

By the present writ petition the petitioners have prayed for quashing the order dt. 2-9-2004 by which the amendment has been refused.

Briefly stated the Original Suit was filed by the plaintiff Sh. Bhagat Ram Kapoor against the petitioner praying for eviction. Paragraph 1 of the plaint reads as under:-

"यह कि वादीगण सम्पत्ति निम्नलिखित के मालिक लैण्डलौर्ड चले आते है।"

In paragraph 1 of the written statement, it has been stated that Sh. Bhagat Ram Kapoor and Sh. Kulbhushan Kapoor which are the owners of the property. Paragraph 1 of the written statement is quoted below: -

"यह कि वाद पत्र का पैरा नं0 1 स्वीकार है।"

Counsel for the petitioners have submitted that Sh. Bhagat Ram Kapoor expired on 16-2-2002 and an application has been filed for substituting the heirs. The petitioners have submitted that in pursuance of the Will dt. 7-1-2004 the grandson have submitted on behalf of Sh. Bhagat Ram Kapoor.

So far as Sh. Bhagat Ram Kapoor is concerned, the amendment sought by the petitioners does not relate to the execution of the Will but by the amendment the petitioners have prayed that the plaintiffs are not the owners and therefore the suit is liable to be transferred from the Small Cause Court under Section 23 of the Provincial Small Cause Court Act. None of the pleadings, which are sought by way of amendment, can be allowed in as much as admittedly the plaintiff Sh. Bhagat Ram Kapoor was the owner of this property. The aforesaid fact has been admitted by the defendant in paragraph 1 on the written statement and therefore the petitioners cannot be allowed to approbate and reprobate as the same time.

Reliance was placed on the Judgment of Modi Spinning and Weaving Mills Co. Ltd. and another VS. Ladha Ram and Co. 1977 (1) SCR 728. It has been held as under:-

> *“”In that case, Ray, C.J. speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants are allowed in the written statement cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretivably prejudiced by being denied the opportunity extracting the admission from the defendants.”*

The aforesaid Judgment has been followed by the Apex Court in Heera Lal Vs. Kalyan Mal and others 1998 ARC (1) 1. The observations are quoted below*:* -

> *“In the case of Modi Spinning and Weaving Mills Co. Ltd and another Vs. Ladha Ram and Co.(1977) 1 SCR 728. In that case, Ray, C.J. speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants are allowed in the written statement cannot be allowed. If such amendments are allowed in the written statement*

plaintiff will be irretivably prejudiced by being denied the opportunity extracting the admission from the defendants'"

Consequently, it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiff's case it could not be allowed as ruled by a three members Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision tool a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view."

Counsel for the petitioners have further submitted that in pursuance of the Will, which has come in the light after the death of Sh. Bhagat Ram Kapoor on 16-2-2002, the amendment has been necessitated. Since Sh. Bhagat Ram kapoor expired on 16-2-2002 and the Will was already in existence as alleged by the petitioner on 7-1-1994. No amendment is required.

Liberty is given to the petitioner to raise the argument by way of affidavit under Order 18 Rule 4 of the Code of Civil Procedure, which can be suitably decided by the courts below after hearing both the parties. Order 18 Rule 4 of the Code of Civil Procedure, the same is reproduced as under:-

"Recording of Evidence

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be

supplied to the opposite party by the party who calls him for evidence. Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filled along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

"Provided that the Court may, while appointing a Commissioner under this sub-rule, consider taking into account such relevant factors as it think fit."

At present the amendment which is sought to be added has no relevance after the death of Sh. Bhagat Ram Kapoor or the will in question.

Consequently, the writ petition is dismissed. No order as to costs.

Dated:- 29-9-2004 (*RAJESH TANDON J.*)

M.K.